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of

RECENT DECISIONS

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THE DISTINCTION BETWEEN CONDITIONS AND LIMITATIONS

As a necessary concomitant to the common law, old and ancient distinctions continue to burden modern practice. Indeed quite a good portion of our legislative function has been devoted to eliminating such impediments. Witness the 19th Century rebirth of real property law. In our endeavor to continue the essence of common law we necessarily are bound to have such incongruities in our midst. The common law is growth founded on experience. But certain vestigial incidentals persist in remaining where they no longer have a rightful place. This article is devoted to pointing out briefly an incidence of this. In order to do so, however, it will be necessary to consider also a modern instrument of practice with which the topic under criticism is inextricably intertwined.

The student, upon his first examining the subject of statutory ejectment, or, if you wish, summary proceedings to oust a tenant as set forth in the Civil Practice Act §§1410 et seq., receives an impression which results probably in bewilderment and almost necessarily in indignation. He learns that summary proceedings will lie if the lease in question is terminable on limitation but will not if it is terminable on condition subsequent. The distinction in spelling is patent but, proceeding a little further, difficulty is found lurking. What is a condition and what is a limitation and state examples of each? It is in answering this query that the student is hampered. To illustrate this, let us endeavor to answer and then to state a general rule following from our answer.

A condition subsequent, or power of termination, has been defined as a provision in a lease, the effect of which is, that upon the happening of an event, the estate is subject to the power of the lessor to bring an action to divest it.

A limitation is that quality of an estate for years that causes the estate granted to continue only until the happening of a contingent event, whereupon it passes to the lessor, without a reentry.

Summary proceedings are allowed only when the tenant is in possession after the expiration of his term without permission. It has been held that if the landlord is to terminate the lease, no summary proceedings will lie and the remedy is ejectment. But, if the lease provides a limitation, so that when by virtue of the happening of the prescribed event, the term limited is to continue only until such happening comes to an end, the term thereby "expires" and summary proceedings are available. (Matter of Guaranty Bldg.Co., 52 A.D.140).

This article necessarily will be a short study in a contrast which in fact does not exist. Taking our above rules and definitions let us examine briefly what the courts have managed to do with them.

In Matter of Lonas v. Silver, 201 A.D.383, the court held that summary proceedings were proper where the lease contained a

provision that in case of the City of New York taking over any portion of the premise demised, the parties were to adjust the rent for the remainder of the term by arbitration, but said arbitration failing, then at the option of the landlord the lease was "to cease and determine." The court said that the option spoken of was merely one of the constituents of the limitation involved.

In Matter of Guaranty Bldg. Co., supra, one of the leading cases on the subject, the distinction that prompted this article was made. There the court said "****The election of the landlord to take advantage of a breach of condition by entry, and thus terminate the estate, is to be distinguished from the case where, by the provisions of the lease, the term is created to endure only until an option to earlier end it has been exercised by the landlord." There the court held that the provision contained in the lease, which said substantially that if a default in the payment of rent should continue for ten days, the lease should, upon the landlord's election, become null and void, was really a condition that necessitated a reentry.

Contrast that with Miller v. Levi, 44 N.Y.489 where the lease provided that the lessor might terminate it at the end of any year in case he should sell or desire to rebuild, by giving 60 days' previous notice. This was held to be a limitation and not a condition.

Recent cases have commented on the fact that prior decisions have made subtle distinctions between the expiration of the term and the termination of the term on breach of condition at the option of the landlord. Burnee Corp. v. Uneeda Drink Co.,132 Misc. 435; Koss v. United Stores Corp., 147 Misc.44.

Perhaps the most comprehensive means of illustrating the maze of interpretation is to refer the reader to the exhaustive annotations set forth in 118 A.L.R. 283 et seq. There the annotator lists a large number of cases dealing with the New York rule on the subject. He states the problem in simple form and then by citing and briefing myriads of cases, shows the difficulty in solution and application:

"What has made the application of the distinction between conditions subsequent and conditional limitations in leases difficult is the presence of a volitional element, or the exercise of an option on the part of the landlord, which seems at first glance to be in conflict with the fundamental construction of a limitation of the estate without any action by either party. Conditional limitations may be classified as follows: (1) The primary form of limitation which undoubtedly implies the expiration of the term by the happening of a contingency provided in the lease, independent of the will of the landlord or of any breach by the tenant, as when the land is granted to a man so long as he continues unmarried, and the like; (2) those in which the future happening provided as a possibility in the lease is set in motion by the landlord as where the lease provides that the landlord has the right to terminate the lease on a number of days notice in the event of a bona fide sale of the property or in case of an intention to rebuild the premises, or by express reservation without any reason given or where the contingency depends upon an affirmative act of the landlord which terminates the lease even withoutnotice, as a reservation to the landlord

to sell the demised premises, it being agreed that upon such sale, or agreement to sell, the lease should be terminated and the demise ended (3) those growing out of a breach of condition on the part of the tenant, such type of limitation arising from a provision inserted in the lease for the benefit of the landlord, whereby, upon a violation by the tenant, the former is entitled to serve a notice electing to terminate the lease after the expiration of a certain specified time, thus creating a limitation of the term measured by the period of time fixed in the notice - the notice, and not the breach of condition, operating upon the lease, the breach being only an event antecedent to, and not the direct cause of, the expiration." (118 A.L.R.283, certain citations omitted).

This somewhat lengthy quotation shows the great amount of classification necessary merely to place in categories those cases already decided. But it provides no rule on which to base an opinion on a new statement of facts.

Uncertainty has no place in the law in re possession of real property by a tenant. Disastrous results may follow. For example, suppose the lower courts hold the lease to contain a limitation. The landlord takes possession. He tears down the building and builds a new one of an entirely different type. Then the higher court reverses. The answer is supplied by Golde Clothes Shop Inc. v. Buffalo Theatres, Inc., 236 N.Y.465. There it was held that the tenant was entitled to judgment on the pleadings in his ejectment action after the summary proceedings had been dismissed on appeal, thus enabling the tenant to hold a heavy sword over the head of the landlord.

It is not the province of the inexperienced student to criticise such a well established rule. But this much remains clear: The purpose of the summary proceedings to dispossess was to write into the law of landlord and tenant a more speedy remedy to facilitate the proper tenure of real property. A tenant who owes his term to the particular demise of a landlord, a title-holder of an inferior estate, should be held to performance on penalty of immediate forfeiture should he violate his agreement. The possession of real property should not be dependent on the time it takes to enter an ejectment judgment. The distinction between conditions and limitations that makes such a result possible has no sound justification. Vestiges of common law which fail to justify themselves should suffer banishment.

WILFORD ARNOLD LeFORESTIER

PROPERTY OWNER'S LIABILITY TO INFANTS

The liability for personal injuries of infants, arising from conditions on real property, presents an interesting and somewhat confusing problem in view of the recent decisions of the New York State Court of Appeals. We examine herein the decisions developing the rules which either fasten liability on a property owner or exonerate him. The scope of our observations is limited to such liability as may arise from a breach of duty to a trespasser or bare licensee. Only incidentally will we refer to the rules covering the liability to an invitee of the property owner.

We take as our point of beginning, the general rule which defines the duty of a property owner to a trespasser or bare licensee which is "a duty to abstain from injuring him either intentionally or by failing to exercise reasonable care, but it (does) did not owe him the duty of active vigilance to see that he was (is) not injured while upon its land merely by permission for his own convenience." (Walsh v. Fitchburg R.R.Co., 145 N.Y. 301, 306.)

While the rule itself appears to be simple, its application has produced confusion. Our purpose is to observe the effect of the infancy of the trespasser or licensee on the duty of the property owner. For a short time, the leading case on this subject in the country was the United States Supreme Court decision in Sioux City & Pac.RR.Co. v. Stout, 17 Wall.657. In that case the action was brought to recover damages for an injury to the foot of a child while playing with the turn-table of the railroad company in the State of Nebraska. The turn-table was located near two traveled roads - one of which passed through the depot grounds. It was not separated from the adjoining property by any fence or structure of any kind. It was unguarded, unlocked, and revolved easily on its axis. The infant plaintiff and a group of boys were wandering about when they saw the turn-table. They began to play about the machine and the plaintiff was injured. The question of the defendant's negligence was submitted to the jury under a charge by the trial court that "to maintain the action it must appear by the evidence that the turn-table, in the condition, situation and place where it then was, was a dangerous machine, one which, if unguarded or unlocked, would be likely to cause injury to children...." The trial court added that if the defendant "did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence." The jury rendered a verdict for the infant plaintiff.

The United States Supreme Court, in upholding the verdict and approving the charge of the trial court, observed: "It is well settled that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult." The court then declared: "As it was in fact, on this occasion, so it was to be expected that the amusement of the boys would have been found in turning this table while they were on it or about it." The defendant's negligence was based apparently on its failure to lock or bolt the turn-table, for the court in observing that such action would undoubtedly have obviated the plaintiff's injury, remarked that the jury could have found "that the defendant had omitted the

care and attention it ought to have given, that it was negligent, and that its negligence caused the injury to the plaintiff." (Railroad Co. v. Stout, 17 Wall.657, 660-663.)

A similar case arose a few years later in the City of Troy, New York - Walsh v. Fitchburg R.R.Co.,145 N.Y.301. The defendant owned a plot of ground on which were railroad tracks and a turn-table. A portion of the premises was unfenced, and the public had, for a number of years, been accustomed to cross the lot from one street to another. The footpath thus worn ran within fifteen or twenty feet of the turn-table. The plaintiff, an infant, and a group of boys were playing upon the turn-table, and in turning it around, the plaintiff's leg was caught and the injury occurred. The plaintiff sought to recover on the theory that the defendant was bound to guard the table in such a way that children could not come upon it, or to station a man there to prevent their entrance, or else the defendant should have used some kind of a device which would or might prevent the turning of the table while it was not in use by the defendant. The Court of Appeals noted that "the whole case in this respect rests upon the doctrine that the turn-table was, as to children of tender years, a dangerous and at the same time, an enticing machine; one which, when seen, would inevitably and infallibly allure children to come upon it for the purpose of playing upon it, and that the natural and probable result of such play would be the injury of the child." The court continued ****"..it is claimed that a person owning such a machine, although it be used on his own land, is bound to exercise vigilance for the purpose of preventing injury to children who come upon the defendant's land allured by the machine and ignorant of its dangers." (145 N.Y.307).

It was then conceded by the court that the Stout case, supra, "undoubtedly sustains the plaintiff's contention that it is a case for the jury." The Stout case, however, said the court, did not state "the better rule" and then declared: "We do not assert that the defendant owed no duty to the plaintiff under the circumstances existing, but we think it did not owe the duty of such active vigilance as would be necessary to exist in order to send the case to the jury and permit it to find the defendant guilty of negligence in this case." (Walsh v. Fitchburgh R.R.Co., 145 N.Y. 308).

The effect of this decision was noted by the Court of Appeals in the recent case of Morse v. Buffalo Tank Corp., 280 N.Y.110. The court say: "The general rule which has prevailed since the well-known turn-table case (Walsh v. Fitchburg R.R.Co., 145 N.Y. 301) is that the so-called doctrine of attractive nuisance does not apply in New York, and that the only duty which an owner of land owes a trespasser or bare licensee is to abstain from affirmative acts of negligence or not to injure intentionally such person."

In 1932, the case of Parnell v. Holland Furnace Co.,234 A.D. 567 was decided. (Affirmed 260 N.Y.604). In that case the defendant abandoned a truck at the end of a driveway between the premises occupied by the defendant furnace company and an adjoining building. The space between the two buildings was used in common by defendant, the furnace company, and the tenant in the adjoining building under leases from the common owner. The defendant had

failed to drain the gasoline out of the truck. The tenant's infant son had removed the cap from the gasoline tank. The following day the infant plaintiff was playing in the driveway with the permission of the said tenant's infant son. The plaintiff stood on the running-board of the car. He picked up two stones which were lying on the bottom of the car, struck them together, and an explosion occurred injuring the infant plaintiff.

The jury rendered a verdict of $60,000 for the infant plaintiff. The Appellate Division, in affirming the judgment for the plaintiff, noted that the "only dangerous element about the dismantled and abandoned car complained of, was the gasoline tank." The court then declared "the defendants should have taken into consideration the well-known propensities of playing children, among others, to climb about disused vehicles and to take off easily removable parts and appliances. At least the jury were entitled to say that they had this knowledge and should have taken these things into consideration."

The court, however, in deciding this case, ruled as follows: "As between the tenant Mahoney and the plaintiff, the relation of licensor and licensee seems to have existed. This relation between Mahoney and the plaintiff did not make the plaintiff a licensee of the defendant furnace company; nor was he a trespasser as to the defendant furnace company. He was rightfully upon the land by permission of a tenant of the owner. Under such circumstances the law applicable to the relation between an owner of the property and a person on the land either as a trespasser upon the owner's property or as a licensee, has no application." Though the Court of Appeals affirmed, without opinion, the Appellate Division, Judge Crane dissented on the ground that the car containing the gasoline was not "inherently dangerous", and that defendant had not failed to perform any duty owing to the infant. (260 N.Y.604, 606).

We note this case primarily because its authority was misunderstood by the Appellate Division in a subsequent case involving the duty owing by a property owner to an infant traspasser or licensee. The error was made in disposing of the case of Morse v. Buffalo Tank Corp., 255 A.D.712, reversed 280 N.Y.110. In that case the defendant carried on a manufacturing business in a shop with an unfenced yard in which tanks and machinery were stored. A drum of gasoline was kept in the yard with a drip-can underneath its faucet. The defendant used the gasoline in its business. Two boys trespassed upon the premises and stole some gasoline. They took the gasoline out into the street where they had started a fire. They tossed the gasoline on the fire and it was ignited. The infant plaintiff, who was walking along the street, stopped to look at the fire. In attempting to run by it, he tripped and fell into the fire. The action was commenced to recover for the injuries of the infant. The Appellate Division affirmed the judgment for the plaintiff on the authority of Parnell v. Holland Furnace Co. (supra). The Court of Appeals, in reversing and dismissing the complaint, ruled that the Parnell case was distinguishable. Judge Finch, writing for the court, remarked "There an automobile had been abandoned not only upon a private driveway, but upon a portion of the yard used in common by the defendants and other tenants of the common landlord. The plaintiff was rightfully upon the land

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at the invitation of one of the other tenants. Under such circumstances the law applicable to the duty owed by an owner of property to a person coming on the land either as a trespasser or as a bare licensee, has no application." (280 N.Y.118)

In disposing of the Tank Corp. case (supra), Judge Finch reaffirmed the rule laid down in Walsh v. Fitchburg R.R., supra. He held that the storage of gasoline by the defendant under the circumstances would not make the defendant liable to a trespasser or invitee who stole the gasoline and was injured by some further act in using the gasoline. Judge Finch relied on Flaherty v. Metro Stations, Inc., 202 A.D. 583, affd 235 N.Y.605, to sustain his conclusion that gasoline is not an "inherently dangerous" material.

He then observed - "If the act ofthe landowner on his own premises would not render him liable to a trespasser or licensee, then to create liability in favor of a member of the public, where the damage is occasioned only through the unlawful intervention of this trespasser or licensee, would impose upon this landowner an additional duty in caring for his own materials upon his own premises, which materials are not inherently dangerous." (280 N.Y. 117).

It was also noted that "The record contains no evidence that boys had been accustomed to take gasoline to make fires away from the premises. The fact that a pail containing dirty gasoline left to accumulate the drippings of a faucet, would lead boys to steal the pail and throw the contents at a fire already burning in the public street, into which fire would trip a boy as he attempted to run by and join the others, is a chain of events containing so many new and unexpected causes that the result was 'not within the range of reasonable expectation.' The common foresight required of business men in the legitimate conduct of their daily business could not reasonably have anticipated such a result."

The case of Collentine v. City of New York, 279 N.Y.119, presents a case where an infant plaintiff was injured in 1932 in a park operated by the City of New York. Near one end of the park was an abandoned building over two hundred feet long and seven feet high. A superstructure had existed on top of this building with posts around the sides to hold it in position. A storm had blown down the superstructure in 1917 - leaving iron bars protruding all around and above the floor. The City no longer used this building for park purposes, but it was not separated from the rest of the park. There were stairs leading up to the roof of the building, and there was evidence to sustain a finding that persons visiting the park often used the roof for recreational purposes. The infant plaintiff stubbed his foot on an iron bar and fell to the ground. He sued for injuries. There were some thirty other children playing on the roof when the accident happened. The trial court directed a verdict for the defendant on the ground that the plaintiff was a trespasser and that the defendant owed him no duty.

The Court of Appeals, in reversing this disposition of the case, found that there was evidence from which a jury might find that there was a clear invitation, either express or implied to children playing in the park and rightfully there to run up the steps of the building where the accident occurred and play on the

roof. The court say "Neither the injured boy nor those children could be deemed trespassers or mere licensees as matter of law." (279 N.Y.124).

The court then ruled: "As to those rightfully in the park and upon the building in question, the defendant was bound to exercise reasonable care to see that the building was safe for their use and to exercise suitable supervision over its use..... In deciding what would be reasonable care under the circumstances, the jury were entitled to take into consideration the well-known propensities of children to climb about and play." (Citing Parnell v. Holland Furnace Co., supra, p.125). The court thus appears to decide the question as one involving a property owner's duty to an invitee. Judge Rippey, however, after citing the above rule declares: "That rule applies even though a child might be deemed technically a trespasser." (Citing Connell v. Berland, 223 A.D.234, affd 248 N.Y.641.

While this latter statement by Judge Rippey was not necessary to the decision of the case at issue, it should not be ignored in an academic discussion. We interpret this statement to mean that even where a child is a technical trespasser, the jury is entitled to take into consideration "the well-known propensities of children to climb about and play." Assuming that such an interpretation is justified, we find the Court of Appeals approving a rule very similar to that laid down in the Stout case (supra) and rejected in Walsh v. Fitchburg R.R.Co., (supra). We call attention to this statement by Judge Rippey only because it was made in a case involving the duties of a property owner to an infant. We do not, however, believe that it would be applicable in the ordinary case involving the duty of a property owner to an infant trespasser or licensee. If, however, it were to be so applied, we believe that the authority of Walsh v. Fitchburg R.R.Co. would be weakened in no small measure.

The case which Judge Rippey cites as an authority for the statement - Connell v. Berland, supra, - did not involve the duty of the owner of real property owing to a trespasser or licensee. In that case, the owner of an automobile left it parked in a congested locality where concededly he knew that children were constantly playing in the street. The ignition keys were left in the car, which was equipped with a self-starter. The engine of the car, however, was not running. A boy started the car and then jumped from it - allowing it to run wild. The car jumped the curb and struck the infant plaintiff who was sitting under a rail against a building. The Appellate Division approved the following charge of the trial court: "So, gentlemen of the jury, the courts have laid down what is the rule to be applied in cases such as this. Did the driver of the car, in view of all the circumstances that existed at the time he arrived at Mott and Bayard Streets, exercise that degree of care that a reasonably prudent careful driver would have exercised under like circumstances?" (223 A.D.236). It is to be noted that the Appellate Division in affirming the jury's finding that the defendant was negligent, was careful to distinguish the case from the holding in Maloney v. Kaplan, 233 N.Y.426. The court say: "It is to be noted in connection with the case of Maloney v. Kaplan (supra) that the court, in holding a defendant not liable in negligence for leaving an automobile unattended with the key in the switch, calls attention to the fact that the situation was not there presented of apparent danger of interference by little chil-

dren indulging in their natural instincts to play. Such an element was present in the case at bar, and the question of the defendant's negligence was properly submitted to the jury to be considered in the light of all the attendant facts and circumstances." (p.236) The Court of Appeals affirmed this holding of the Appellate Division without opinion.

The child who started the defendant's car here was a trespasser. The infant plaintiff who was injured was an innocent party. Except for the presence of children playing in the street the defendant apparently would not have been negligent merely because he left his keys in the car. The presence of children in the street to the knowledge of the defendant was sufficient to allow the jury to speculate as to the defendant's negligence. This case, it is to be noted, involved personal property and not real property. We do not believe that it can be said fairly that the defendant was guilty of any affirmative act of negligence here. Automobiles are not regarded as dangerous instrumentalities. (See Maloney v. Kaplan, supra.) It, therefore, appears that the so-called doctrine of "attractive nuisance" may apply in New York State in a case such as this one. As noted above, Judge Rippey, in referring to the Connell case (supra) in his opinion in the Collentine case (a case involving real property) remarked that even where the infant was a technical trespasser the jury might take into consideration "the well-known propensities of children to climb about and play." The authority for this statement was the Connell case. Would this rule apply in a case involving the duty of a property owner to a trespasser or licensee?

It was not applied in Morse v. Buffalo Tank. There the plaintiff was an innocent party. There the infant wrongdoer was a trespasser. There the jury was not allowed to speculate as to the defendant's negligence. It may be said, correctly, that there was no evidence to show that children had been accustomed to taking away gasoline from the defendant's premises in the Tank case. However, Judge Lehman, in his dissent in that case points out that "the defendant conducted its business upon an uninclosed lot abutting upon a street where boys congregated for play." (280 N.Y.120.) In both cases children played nearby. In both cases an infant trespassed and committed a wrongful act which resulted in injury to an innocent infant. In the Connell case the jury was allowed to speculate. The majority of the court in the Tank case held that the fact that the boys might come in and steal gasoline and throw it on a fire and cause injury to third parties was not "within the range of reasonable expectation." The majority of the Court in the Connell case (involving the runaway automobile) felt that the defendant should have foreseen that a child might "trespass" on the automobile, start it moving, and cause injury to innocent parties. The distinction: one case involves an automobile and the duty of its owner to infants playing about; the other, real property and the duty of the owner to infants playing about. The rule: that the jury might take into consideration "the well-known propensities of children to climb about and play" was applied in the former, not in the latter where the complaint was dismissed. Can it be said that the rule applies "even though a child might be deemed technically a trespasser" on real property? In our opinion - and we believe that it is supported by the cases above - the answer must be in the negative. We believe that Judge Rippey's statement in the Collentine case, although made in a litigation involving real property, must be limited in accordance with the authority from whence it came (Connell v. Berland, supra).

The latest Court of Appeals case bearing on the general topic of our discussion was decided in April, 1940. It was Bowers v. City Bank Farmers Trust Co., 282 N.Y.442, and involves a personal injury action by an infant plaintiff who accompanied a schoolmate to the latter's home in an apartment house. Finding no one in the apartment, the plaintiff in response to her friend's invitation, joined her as she mounted a flight of stairs which led from the fifth floor up to a door opening onto the roof where ten other children were at play. In the course of the games, the plaintiff climbed upon a quantity of stone slabs and bricks which were piled against the side of a ventilator shaft and skylight which projected above the roof and was capped by unscreened glass. The bricks moved and the plaintiff fell through the skylight, sustaining injuries. The defendant owned the building. Its janitor, who was in charge of the building, played cowboy with the children on the roof from time to time. The Court of Appeals found that the infant plaintiff was an invitee on the premises, allowed the knowledge of the janitor to be imputed to the defendant, and ruled that it was error for the trial court to non-suit the plaintiff.

The trial court and the unanimous Appellate Division held that the plaintiff was a mere licensee and that the defendant owed the plaintiff no greater duty than to refrain from intentional or wanton injury. The court of Appeals, however, in accordance with its finding that the plaintiff was an invitee, ruled that "Although the doctrine of attractive nuisance does not apply in this State (Morse v. Buffalo Tank Corp., supra, p.115) the jury was 'entitled to take into consideration the well-known propensities of children to climb about and play.'" (282 N.Y.442, - citing Collentine v. City of New York, and Parnell v. Holland Furnace Co., supra).

We come to the end of our examination of the cases involving the duty of a property owner to an infant trespasser and licensee - and incidental thereto - some of the rules applied in cases involving invitees. It would be sheer folly for us to attempt to define concisely the rules to be followed in each case. Our discussion sufficiently reviews the general principles which must guide the litigant to success. It will be seen, however, that while an infant plaintiff must not rely on the doctrine of "attractive nuisance" as such, he may be successful if he builds up an implied license, or shows that the "nuisance" was such that injury to infants could be foreseen by its creator, or convinces the court that it was inherently dangerous. It is then probable that the court will allow the jury to consider "the well-known propensities of children to climb about and play."

We cannot conclude our observations on this subject without concurring fully with the statement of Judge Pound in Vaughan v. Transit Development Co., 222 N.Y.79: "The exact phraseology of general distinctions between the duty to trespassers, mere licensees and invitees, and between active and passive negligence has been productive of confusion....and will not help us greatly... The standard of reasonableness which must be established will vary with the circumstances of the case." (222 N.Y.83.)

R. BURDELL BIXBY

ACCRUED ALIMONY - A VESTED RIGHT

The status of the present law of New York as to the exact standing of alimony accrued under a valid divorce or separation decree seems to be unsettled, due to a recent decision handed down by the Appellate Division, Third Department. (VanDusen v. Van-Dusen, 17 Supp.2d 96.) The scope of this article is a treatment of the subject of alimony from a historical viewpoint, the purpose being to see whether the trend of judicial opinion leans toward considering alimony as a vested or not a vested right.

Alimony in a separation decree represents a measurement by the court of the husband's duty to support his wife; while in a divorce decree it represents the same thing, the court saying in effect that, because the marriage was dissolved through the fault of the husband, his duty of support should still continue. Without a statute or a reservation in the decree, the court is powerless to modify or change in any way the husband's duty to pay the alimony decree, it having been stated early that there is no inherent or statutory power to modify a judgment because of change of circumstances. (Erchenbrach v. Erchenbrach, 96 N.Y. 456; Kamp v. Kamp, 59 N.Y.212).

The present New York statute on this subject is found in the Civil Practice Act §1170. "The court by order upon the application of either party to the action.....at any time after final judgment may annul, vary, or modify such directions...."(italics our own). The interpretation of this section contains the solution to our problem.

Nearly every state has a somewhat similar statute, and the great weight of opinion is that under such a statute instalments of alimony become vested when they become due and the court has no power to modify the decree as to them. (For a listing of the states, pro and con, see 94 A.L.R.331. See also Dreesen v. Dreesen -Calif.,1939- 88 Pac.2d 223). In the A.L.R. annotation New York is listed with the majority, and the correctness of this viewpoint is that with which we are concerned.

The great landmark of this subject is the famous and well reasoned opinion of Sistare v. Sistare, 218 U.S. 1 (1910). The plaintiff wife sued on a New York judgment in Connecticut to recover arrears in alimony, and the point was raised that this was not a judgment creating vested rights and hence entitled to full faith and credit in Connecticut, because of the reserved power in the New York court to modify. The statute in New York at that time was substantially the same as now. The highest court of the land laid down the following rule: First, that generally speaking where a decree for alimony is rendered payable in instalments, these instalments become absolute and vested when due, and are protected by the full faith and credit clause of the United States Constitution provided no modification of the decree has been made prior to the maturity of the instalments, since alimony is as much a debt of record until the decree has been recalled as any other judgment for the payment of money. Second, the general rule does not obtain where by the law of the state giving the judgment, the right to receive the alimony is discretionary with the court to such an extent that no absolute or vested right at-

taches to receive the instalments ordered by the decree to be paid even though no application to modify has been made prior to the instalments becoming due.

The court then analyzed the New York law to see if it permitted a court to modify the decree both as to back and future alimony. With reference to the New York statute, it said that there was nothing in its language expressly giving "power to revoke or modify an instalment of alimony which had accrued prior to the making of an application to vary or modify and every reasonable implication must be resorted to against the existence of such power in the absence of clear language manifesting an intention to confer." (Underlining is our own.) It was also pointed out: that these judgments could be enforced by execution; that if the power to vary operates retroactively and may affect past due instalments so as to relieve obligation to pay them, it would follow that the power would exist to increase the amount allowed, and it is additionally impossible to imply such authority in the absence of provisions plainly compelling such a conclusion; that no provision is found in the statute looking to repayment by the wife of any instalments paid in the event of a retroactive reduction of the allowance. From the above the court deduced that the New York statute was not retroactive and alimony judgments in New York insofar as installments had accrued created vested rights entitled to full faith and credit in foreign jurisdictions.

Since the decision of this case, the New York courts have consistently held that accrued alimony is a vested right. A few illustrations will suffice.

In Cowles v. Cowles, 203 A.D.405 (First Department, 1922), the plaintiff in New York sought to recover accrued alimony on a New Hampshire judgment. The New Hampshire judgment gave power "to revive and modify any order made by it" and to "make such new order as may be necessary." The court held that this statute did not permit retroactive modification within the doctrine of Sistare v. Sistare, supra, and so the judgment was entitled to full faith and credit in New York. The court went on to say as to sections of our own Civil Practice Act (§§1159 and 1170) that "these provisions would no more destroy the final character of the judgment theretofore rendered than would the provisions of §1771 of the Code of Civil Procedure from which they were derived and which were not found to destroy the character of the judgment as entitled to full faith and credit. (Sistare v. Sistare.)"

In Parkinson v. Parkinson, 222 A.D.838 (Second Department, 1928), the appellate court reversed the lower court and allowed judgment to be docketed for alimony due under the decree. "The court had no power thus informally to construe or modify its decree or to make its order retroactive so as to deprive the defendant (wife) of the moneys due her thereunder. Plaintiff may, however, on the facts disclosed apply to the court for a modification of its decree as to future payments."

In Brice v. Brice, 225 A.D.453 (Fourth Department, 1929), the plaintiff moved to punish the defendant for contempt for non-payment of accrued alimony, and the lower court amended the original decree

nunc pro tunc by reducing the amount allowed the plaintiff and crediting the overpayment to the accruals, thereby wiping them out. Then the lower court denied the plaintiff's motion to punish for contempt on the theory that there was no default. The appellate court reversed, saying that the court was without power to reduce the amount of alimony accrued nunc pro tunc.

Then, as if to clinch the proposition, the Court of Appeals decided Harris v. Harris, 259 N. Y. 334, in 1932. Here a divorce decree was granted awarding alimony and the wife applied for an increase, the question being whether the increase should be granted from the time of the application or from the time of its decision. The court held that it should be the former. It carefully distinguished this case from Brice v. Brice, supra, and Parkinson v. Parkinson, supra, which limited the power of the court to reduce alimony due and owing prior to the application to modify. "These past due sums have become vested rights of property which the Supreme Court has no power to take from her."

One might wonder how, in the face of such overwhelming authority, the court in the VanDusen case (17 Supp.2d 96) could reach a different conclusion. In this case the plaintiff sought to docket a judgment for $15,000 accrued alimony. The lower court reduced the alimony nunc pro tunc and directed the entry of judgment for $350. The appellate court, with no explanation, affirmed under the authority of Fox v. Fox, 263 N.Y.68 (1933); Kirkbride v. Van Note, 275 N.Y.244 (1937); and Karlin v. Karlin, 280 N.Y. 32 (1939). An examination of these cases will now follow.

Fox v. Fox was a case where the plaintiff obtained a divorce decree with alimony provisions. Defendant later moved to have the alimony reduced, which motion was denied. Defendant appealed, and then plaintiff moved for an allowance of counsel fees and printing expenses. The question then raised was as to the power of the court to award these fees. The court held that §1170 of the Civil Practice Act gave the power to the court so to modify its original decree as to allow these fees. The court reiterated the proposition that the effect of the section was to write a reservation into every final judgment of divorce. This case, then, on analysis, seems to lend no support to the theory that accrued alimony is not a vested right, and indeed the case was not on that proposition. Its explanation of §1170 in no way intimates an interpretation that this result should follow.

Kirkbride v. Van Note was a case where plaintiff secured a divorce from her husband in 1926 with an alimony provision. Several months thereafter she remarried, at which time the husband ceased paying alimony. Ten years later the husband died, and now plaintiff seeks to hold his administrator for accrued alimony, apparently having made no claim on him while he was alive. Defendant moved under §1159 of the Civil Practice Act to modify the decree so as to eliminate the alimony accrued from the date of her remarriage. The court granted this motion of the defendant on the ground that §1159 provided that after remarriage the court must on application modify the final judgment by annulling the provisions of such final judgment directing payment for the support of the plaintiff. Because of the public policy behind this statute and the obvious purpose it seeks to accomplish, the court could not have come to a different conclusion. This case differs

greatly from the proposition being analyzed here, because §1170, unlike §1159, is not a "must" statute. Under §1159, the defendant's liability in effect ceases at the wife's remarriage, while under §1170 it continues until modified as to the future.

Karlin v. Karlin (280 N.Y.32) involved this situation. The plaintiff sued for divorce and obtained an interlocutory judgment which contained an alimony clause directing defendant to pay $15 per week for the support of the wife and child. In January, 1925, the parties agreed that the wife accept $1,000 in lieu of her alimony, and that the husband pay $6 a week for the support of the child. On February 4, 1924, the divorce became final. The agreement has been completely executed by the defendant, and in 1936, the plaintiff sought to hold defendant to the alimony provisions of the decree in a New Jersey suit. The defendant now seeks to modify the original decree nunc pro tunc to conform to the agreement of the parties. The court granted this motion under the authority of Civil Practice Act §1170, so as to "square it with what was then the obligation of the husband under the agreement made by the parties." In this case the court is merely incorporating in the original decree what originally should have been there, namely, the agreement of the parties. It is from the agreement that the defendant's liability arose, and not from the divorce decree, and so no vested rights under the decree of either party were interfered with here, because insofar as alimony was concerned the decree actually gave no rights. In a sense the Kirkbride case and the Karlin case are identical, because in each the husband was relieved from liability because of the creation of another source of support in lieu of the provisions of the decree. And indeed this was the theory on which the case was argued rather than any theory that defendant under §1170 of the Civil Practive Act pursuant to an order of the court could interfere with vested rights. (See appellant's brief, p.20).

Since these decisions, with the exception of the VanDusen case, the New York courts have continued to adhere to the general rule that accrued alimony is a vested right.

In Smith v. Smith, 255 A.D. 652 (Second Department, January, 1939), decided just before the Karlin case but after the Fox and Kirkbride cases, the court dealt with a New Jersey decree, the alimony provisions of which the plaintiff wished to enforce here. The defendant claimed that the decree was not entitled to full faith and credit in New York under the Sistare doctrine. The New Jersey statute permitted the court to make such alteration of the decree after final judgment as is fit and just. The court held that this statute did not permit retroactive modification, and so the decree could be enforced here insofar as alimony had accrued. In this case the court said, "In respect to the statutes of different States in relation to this power to modify retroactively, there is variance, but it is safe to say that in general the right to modify, as in this State, pertains to the future where changed conditions warrant such modification, rather than to a power to disturb the finality of the original decree unless some reservation is made in the decree itself." In speaking of the New Jersey statute, the court further said, "Obviously this statute looks to future modifications as does our own statute similar in its terms. Civil Practice Act §1170)." From the above, it is clear that this court in 1939 considered accrued alimony as a vested right, and that §1170 did not confer any retroactive power on the court.

In Wiseman v. Wiseman, 172 Misc. 114 (July, 1939), the plaintiff sought to punish the defendant for contempt of court in arrears of alimony payment, and the court held that it was precluded from relieving defendant from amounts already due. "The courts of this State have uniformly held that upon a motion to reduce an order or judgment for alimony no relief can be granted as to amounts which have become due prior to the time of the application. Those sums have become vested rights of property which the Supreme Court has no power to take from the party in whose favor they have been awarded. (Harris v. Harris, 259 N.Y.234.) Therefore, although I am disposed to relieve defendant from this burden, which it is obvious he is in no position to carry, I am precluded from doing so."

Beyond the realm of the judiciary, the Legislature in 1939 clearly showed its intent by specifically allowing the docketing of a judgment for alimony arrears which judgment could be enforced by execution. (See C.P.A. §1171-b, and explanation in Durlacher v. Durlacher, 173 Misc. 329). Surely the Legislature would not have provided for the docketing of a meaningless judgment, that is, one which could later be extinguished by a retroactive amendment to the original decree.

The case of Delbridge v. Sears, 179 Iowa 526, 160 N.W. 526, gives a well-reasoned analysis of the meaning of statutes such as §1170 of the Civil Practice Act. The court there said that the original decree determined the conditions of the parties at that time, and it is only when there is a change in these conditions that power to make subsequent changes in the original decree can be exercised. The original decree is final as to the then circumstances of the parties. When these conditions change, a court of equity having obtained jurisdiction originally retains it so as to change the decree to meet new conditions. The statute gives no retrospective effect. Past rights and duties have been determined and this determination is conclusive on the parties. When conditions change, the court has power under the statute, when petition is presented to change or modify which change must look to the then condition of the parties, to fix and determine not what their past rights were nor what their past duties were, but what their rights and duties toward each other touching alimony shall be thereafter.

In conclusion it may safely be stated that the judicial opinion in New York continues to adhere to the majority view on this proposition, in spite of the authority to the contrary in VanDusen v. VanDusen, supra, which seems to stand alone in its conclusion. The statute, both on principle as set forth in the Delbridge case, supra, and actually according to the wording of the statute, and the meaning attributed thereto by the Sistare and later New York cases, should not be strained to include a retroactive meaning.

GEORGE BURT GROW

SECTION 1272 OF THE PENAL LAW

Section 1272 of the Penal Law provides:

"Each person, co-partnership, corporation or joint stock association carrying on a business by lease or otherwise, who does not pay the wages or all his or its employees in accordance with the provisions of the labor law is guilty of a misdemeanor, and upon conviction therefor, shall be fined not less than one hundred nor more than ten thousand dollars for each offense. An indictment of a person or corporation operating a steam surface railroad for an offense specified in this section may be found and tried in any county within the state in which such railroad ran at the time of such offense."

Section 1932 of the Penal Law provides:

"In all cases where a corporation is convicted of an offense for the commission of which a natural person would be punished with imprisonment, as for a felony, such corporation is punishable by a fine of not more than five thousand dollars."

The violation of §1272 of the Penal Law is designated in that section as a misdemeanor. However, the punishment therein prescribed is in excess of that allowed for misdemeanors. As a result, the issue becomes: whether violation of §1272 is, in truth, a felony or a misdemeanor.

This question arose sharply in a case recently decided by the Court of Appeals. The decision of that court is that the offense is a misdemeanor. The case came before the court in this manner: Carl F. McKinney is a stockholder and officer of the Troy Trap Rock Corporation. He is the petitioner. The defendants are Edward L. Hamilton, Justice of the Peace, Town of Brunswick, Rensselaer County, N.Y., and nine men who were employed by the Troy Trap Rock Corp. in working in and about a stone quarry of the Corporation at Cropseyville, Rensselaer County. These nine men individually swore to informations before the Justice of the Peace, charging McKinney and the Corporation of which he is an officer, with the violation of §196 of the Labor Law and §1272 of the Penal Law, in that they failed and neglected to pay in cash the weekly wages of persons employed by them. On the basis of these informations, warrants were thereupon issued under which the petitioner, McKinney, was arrested and arraigned before the Justice of the Peace before whom he pleaded not guilty.

All further proceedings in prosecution of these charges were stayed by Special Term of the Supreme Court, Rensselaer County, which granted the petitioner an order of prohibition under Article 78 of the Civil Practice Act based upon an order to show cause, petition and supporting affidavit which alleged in substance that the charges lodged against him before the Justice of the Peace were not misdemeanors but felonies and consequently the latter sitting as a Court of Special Sessions did not have jurisdiction to try him.

The Justice of the Peace interposed an answer to the petition which in substance particularly denied that the charges in question were felonies and alleged that the Justic sitting as a Court of

Special Sessions did not have jurisdiction to try the petitioner therefor. In addition thereto, the answer further set up three distinct affirmative defenses which in substance alleged that the charges were misdemeanors, that the defendant-Justice had jurisdiction and finally that the petitioner had mistaken his remedy in applying for an order of prohibition.

In granting the order of prohibition, Mr. Justice Schenck at Special Term rendered an opinion stating in substance that the offense violating §1272 of the Penal Law is punishable in the manner of a felony and hence the Court of Special Sessions cannot entertain jurisdiction despite the fact that the Legislature made the crime a misdemeanor. The Appellate Division, Third Department, unanimously affirmed the order of prohibition granted at Special Term and subsequently denied an application for leave to appeal to the Court of Appeals. However the Court of Appeals upon application granted leave to appeal.

In the Court of Appeals the petitioner, McKinney, set forth a very strong and convincing argument. His theory was that the two sections above quoted - 1272 and 1932,- show such an utter inconsistency as to justify the statement that a violation of §1272 denominated a misdemeanor, particularly as to punishment, is twice as severe as for a violation of §1932 classified as a felony.

A corporation guilty of stealing fifty thousand dollars is guilty of a felony. The punishment therefor cannot exceed five thousand dollars.

A corporation or a person guilty of not paying an employee five dollars in wages, according to §1272, is guilty of a misdemeanor and shall be fined therefor not less than one hundred dollars and not more than ten thousand dollars.

Where the punishment imposed on a corporation for a violation of §1272 is twice as great as that for conviction of a felony, it is unreasonable that such a charge can be commenced by the mere filing of an information in a Court of Special Sessions, or with a Justice of the Peace, whereas a felony charge against a corporation must be prosecuted by indictment. (Code Crim. Procedure §§4, 254).

It must be admitted that a Court of Special Sessions or a Police Court has no jurisdiction to try a defendant for a felony. Simply labeling an offense a misdemeanor does not make it so. The question whether an offense is a misdemeanor depends not on its legislative designation, but on the punishment prescribed.

It was also urged that the provision of §717 of the Code of Criminal Procedure allowing that a defendant who has been fined be directed to be imprisoned until the fine is satisfied, might be committed to the Rensselaer County Jail for 10,000 days (one day for each dollar). To permit such a sentence were a defendant has no money, is to re-establish debtors' prisons in this country and to establish "perpetual imprisonment."

The Penal Law, §2 subdivision 6, provides:

"Division of crime. A crime is:
1. A felony; or,
2. A misdemeanor.
Felony. A 'Felony' is a crime which is or may be punishable by, (1) Death; or, (2) Imprisonment in a state prison.
Misdemeanor. Any other crime is a 'misdemeanor.'"

From time to time, the Courts of this State, in determining the grade of offenses, have observed this test. Aided by §§2181, 2182, and 2183 of the Penal Law, offenders have been given imprisonment in the State Prison where the sentence was for more than one year, and in a local prison where less than one.

A violation of §1272 of the Penal Law is punishable by fine only. There is no provision in this statute or any other under which a defendant convicted of this offense may be imprisoned in a State prison.

The amount of a fine imposed for a violation of law, in and of itself, has never been regarded as a determining factor in grading the offense. The sole and decisive factor has always been whether the crime was punishable by imprisonment in a State prison irrespective of whether or not the Legislature has labeled the crime a felony or a misdemeanor.

Because a failure of the defendant to pay the fine of $10,000 would subject him to imprisonment for 28 years, it does not follow that a Court of Special Sessions created to deal with petty offenses would be acting in excess of the powers of a court of limited jurisdiction if it attenpted to exercise jurisdiction in the case at bar. There is no justification for such conclusion. In defining what shall constitute, respectively, a felony and a misdemeanor, the amount of fine imposed is not made a criterion. A corporation acts, of course, through its officers and the provisions of the Labor Law and the Penal Law are applicable to corporate agents.

Here, the prosecution is against a natural person. In order to make the crime a felony with respect to such person, as clearly specified in §2 Subdivision 6 of the Penal Law, it must be punishable by death or imprisonment in the State prison. Irrespective of the amount of fine which may be imposed, the offender may not be imprisoned in a State prison in default of the payment of any fine.

In default of payment of a fine imposed, a defendant may be imprisoned only in a city jail or county penitentiary and cannot be sentenced to a State prison. This is clearly apparent from a reading of the provisions of §§487 and 488 of the Code of Criminal Procedure.

The defendant asserted that if the petitioner's theory were accepted the great bulk of misdemeanors, long denominated as such, would become felonies. He used this illustration: A person is charged with a misdemeanor such as maintaining a public nuisance for which no specific punishment is prescribed in the Penal Law. By virtue of §1937 of the Penal Law the offender could be subjected to a year in the county jail or a fine of $500 or both. Assuming, further, that a Court of Special Sessions saw fit to impose both the fine and the sentence of imprisonment, and that the defendant could not pay the fine, the Court of Special Sessions

would lose the jurisdiction conferred and be rendered powerless to enforce the punishment, which it is specifically authorized to impose, because the defendant might be subject to a term of imprisonment in excess of two years.

It was further argued by the defendant that prohibition is not the proper remedy available to the petitioner. Under the authorities, a writ of prohibition will be granted only in the case of extreme necessity and where no other remedy can be had. A writ of prohibition will not lie where there is a remedy of appeal. In the event of an excessive fine being imposed, this in and of itself would be a sufficient basis for appeal.

This closed the arguments of the respective parties in the Court of Appeals. Justice Lewis of that Court rendered the opinion which is reported in 292 N.Y. at page 393. He said that the argument of the petitioner that if the Legislature intended by §1272 to define a misdemeanor it would not have provided as punishment a fine which may be double the maximum fine which can be imposed upon a corporation for the commission of a felony under §1932 of the Penal Law. Justice Lewis wrote as follows: "The fallacy which we find in the argument is that, in testing the quality or classification of a crime, and after properly employing the punishment prescribed as a characterizing factor, the respondent mistakenly treats the imposition of a fine as being inthe same category as a sentence of imprisonment.

"The punishment provided by §1272 of the Penal Law is a fine - not imprisonment in a State prison. The offense does not become a felony merely because by applying §718 of the Code of Criminal Procedure a defendant may be imprisoned one day for every dollar of the fine unpaid until the fine be satisfied. The commitment authorized by §718 for failure to pay a fine does not increase the imprisonment specified in the criminal statutes to which it is applicable. It follows only upon a defendant's failure to pay the fine and is a means of bringing about collection of the same. 'It is well settled that this remedy for the collection of a fine is not part of the sentence. It is simply a means of enforcing the sentence.****A direction, in a sentence imposing a fine that defendant stand committed until the fine is paid is no part of the penalty for the offense, but is merely a means of compelling obedience to the judgment of the court.' (City of Buffalo v. Murphy, 228 App. Div. 279, 287).

"In reaching a conclusion opposed to the respondent's claim we are influenced by the fact that if a defendent refuses to pay a fine imposed as punishment - which is the only form of punishment provided by the statute with which we are now concerned - and he is committed under §718 of the Code of Criminal Procedure, he is not required to stand committed for a definite term in prison. The duration of his confinement is within his own control. By payment of the fine imposed he is at once set free.

"We have not overlooked the rule of People ex rel. Cosgriff v. Craig (195 N.Y. 190), upon which Special Term relied. That case is to be distinguished by the fact that the relator was

prosecuted for petit larceny as a second offender, at a time when there were statutes expressly authorizing the court to sentence him for a term of two years. The grade of the offense was obviously a felony in view of authorized punishment of imprisonment for two years.

"The conclusion we have reached makes unnecessary our consideration of defendant's point that prohibition was not the proper remedy available to the petitioner."

HAROLD EDWARD KORLMAN

KRAUSE V. KRAUSE

If a layman should chance to pick up one of the copies of the New York Advance Sheet and read the case of Krause v. Krause, 282 N.Y.355, he might well wonder whether monogamy is still being insisted upon by the courts of our State. The case is one of a husband and wife who had been married in New York in 1905 and lived here ever since. In 1932 the husband, defendant in the action, while retaining his residence in this State, made a visit to Reno, Nevada, where he invoked the jurisdiction of the courts of that State and obtained a decree of divorce. His then wife neither made an appearance nor was personally served. Subsequently this defendant married again and lived with Wife No. 2 for several years and then abandoned her. Whereupon she brings this action for a separation in the action; she also seeks support. The defendant husband seeks to avoid liability for this support by alleging the invalidity of the Nevada decree which he had obtained from Wife No. 1, which made the second marriage void. The court turned a deaf ear to his plea and held that he was precluded from setting up the invalidity of the divorce so obtained, and stated that it was not open to the defendant in these proceedings to avoid responsibility which he voluntarily incurred as regards his second wife. The court in justifying this position went on to say that nothing in this decision should be taken to mean that because the defendant may not in these proceedings avail himself of the invalidity of the Nevada decree, he is not still the husband of his first wife.

This apparently inconsistent position toward void foreign divorce decrees is, however, necessary when the problem is viewed from its broad social aspect. Before touching upon this necessity let us take a quick birds-eye view of foreign divorces generally. Our Legislature has by statutory enactment stated that there is but one sufficient ground for absolute divorce, and that is adultery. People v. Baker, 76 N.Y. 78. By virtue of such policy we have refused to recognize as binding a decree of divorce obtained in a court of a sister state, not the matrimonial domicile, upon grounds insufficient for that purpose in this State, when the divorced defendant resided in this State and was not personally served with process and did not appear in the action. (Olmsted v. Olmsted, 190 N.Y. 458.) Such policy is not hostile to the full faith and credit clause of the Federal Constitution, Haddock v. Haddock, 201 U.S.562. The principle of comity between the states does not require of a state the operation of a divorce decree of a sister state which violates principles of morality, or the public policy established by it. Whether or not the operation of a foreign decree of divorce in a given case will contravene the policy or injure citizens of the state is exclusively for its own courts to determine.

In determining the questions which have been presented in New York, our courts have consistently adhered to one policy though in so doing it often appears that strict legal reasoning may have taken an occasional holiday. The case of Starbuck v. Starbuck, 173 N.Y. 503, is the leading case in the State where some weight has been awarded a foreign decree which for other purposes would be declared void. In that case the wife of a deceased husband sought

dower rights in the real estate of which he died seized. The defendants put in evidence a record of a foreign decree obtained by the plaintiff from her now deceased husband on the ground of extreme cruelty. The divorce was not of the nature recognized by our courts as valid, yet it was received for the purpose of defeating that plaintiff's dower claim. The court stated that where a party has procured a judgment or decree to be entered, submitting himself to the jurisdiction of the court, he can't thereafter be heard to question the jurisdiction of the court which entered that judgment or decree. In Brown v. Brown, 242 A.D.33, a similar conclusion was reached where the plaintiff's action was based on a contract dependent upon marriage between the plaintiff and defendant, and again the defendant was not allowed to impugn the validity of the marriage by proof that a judgment of divorce previously obtained by himself in the courts of a sister state was invalid for lack of jurisdiction.

The case of Stevens v. Stevens, 273 N.Y. 157, is the leading case cited by parties who wish to have their cake and eat it too by taking advantage of invalid divorce decrees which they have obtained, when the question arises collaterally. That was an action by a wife for a separation and the husband set up a counterclaim for divorce under C.P.A.§1168. In answer to this counterclaim the plaintiff attempted to put in evidence a decree of divorce obtained in Nevada, which State had no jurisdiction of the wife at the time. The court there stated that this decree was no bar to the counterclaim and that the decree should have no effect upon the right of either party to a full adjudication in this action of their existing marital status. To forestall any misinterpretation, they expressly declared that this is not a case in which one spouse after having secured a foreign divorce decree not binding in this State on the other, attempts thereafter to assert in our courts a private claim or demand arising out of the marriage as was the situation in Starbuck v. Starbuck (supra). They further remarked that a void decree cannot in itself be a reason why the husband should have less than his legal rights and concluded that they weren't bound to inquire what the result would be in some further event that has not happened. As further proof that Starbuck v. Starbuck still stands, is the case of Hynes v. Title Guarantee & Trust Co., 273 N.Y. 612, which follows the theory of the Starbuck case and which as will be noted, was reported in the same volume as the Stevens case.

A much closer case to that of Starbuck, but which held as did Stevens, is that of Davis v. Davis, 279 N.Y.657. There in an annulment action brought by Husband No. 2 it was established that the defendant was induced to marry him after he had shown her a divorce decree which Husband No. 1 had obtained from her, in Florida, which State did not have jurisdiction of the wife. The court, however, did not preclude Husband No. 2 from succeeding in his annulment action which was based on the invalidity of the divorce obtained by Husband No. 1. True, in that case, the one who sought to impeach the void foreign decree was not the party who procured it, yet it did appear that Husband No. 2 had used the decree to his advantage. Aside from Krause, the case of Vose v. Vose, 280 N.Y.779, is the most recent decision in which the preclusion rule has been sought to be applied. There the husband and wife by what appears to have been

collusion, obtained a so-called Mexican divorce by means of correspondence and afterwards the plaintiff wife sought a separation. She was not precluded by virtue of her participation in obtaining the foreign decree. The existence of this collusion and the nature of the decree itself, alone are sufficient reason for tossing out the consideration of this determination.

From these cases there appears to be a single theme which threads its way into all decisions where an admittedly void decree has formerly been obtained. If the sole question involved is the marital status as such, and nothing more, the void decree will be treated as void. However, where from any view of the facts it appears that property rights are to be settled, private funds to be distributed or where there is danger that a neglected spouse will become a public charge, the void decree will be given life to the extent of holding the obtaining spouse to his bargain. In the Stevens, the Davis, and the Vose cases, the marital status alone was involved, and insuch cases our courts will continue to clean their own houses. But where dower is to be adjudged as in Starbuck, or contract rights fulfilled as in Brown, the foreign decree is given what might be termed limited effect. The Krause case comes in this second category due to the danger of Wife No. 2 becoming a public charge. The husband undertook the responsibilities of her support upon reliance on a decree which, though void, was obtained by him and as considerations outside of the mere status of the parties, are present, he is precluded from denying its validity.

WARREN M. ANDERSON

LIABILITY OF HOSPITALS FOR INJURIES TO PATIENTS

The case which gave rise to this note is that of Post v. Crown Heights Hospital, 173 Misc. 250.

This case involved an action brought to recover damages for personal injuries suffered as a result of negligence of an interne of the defendant, a non-charitable hospital. The plaintiff was admitted in the defendant hospital for the purpose of enabling her own doctor to perform an appendectomy. After the operation, an interne gave the plaintiff an injection to relieve post-operation shock. The injection was negligently made, resulting in serious injury to the plaintiff. The defendant contends that the interne was employed as a doctor; that he acted in his professional capacity; that he was not a servant of the hospital; that the doctrine of respondeat superior cannot apply. The court held that the plaintiff was entitled to recover for the injuries.

What is the law as to the liability of a hospital for injuries to a patient? In determining whether or not the holding is in line with the weight of authority, we will examine some of the cases involving a hospital's liability.

We might raise a few questions as signposts to aid us in tracing the development of the law of this State in this regard.

1. Is there a distinction between the liability of a charitable hospital and a non-charitable hospital?
2. If there is a distinction, just where does it lie. Is it as to liability for acts of administrative agents? Is it as to liability for acts of doctors and nurses?

The distinction which existed at one time has been greatly modified by recent cases. Perhaps the most frequently cited case is Schloendorff v. Society of New York Hospital, 211 N.Y. 125. Here the court was dealing with an injury to the plaintiff-patient, resulting from an unauthorized operation by a surgeon in the defendant's hospital. The plaintiff was a paying patient. The defendant alleged that it was a charitable corporation. The court held that a charitable hospital is one not organized for profit. The mere fact that the plaintiff paid for the services does not make it a non-charitable corporation. The question is whether or not the hospital was organized for the purpose of making money.

Judge Cardozo stated the law to be that a hospital, whether public or charitable, is not liable for negligence of its physicians and servants in the treatment of patients. This exemption was based on two grounds. The first ground is an implied waiver, i.e., one who accepts the benefit of a charity enters into a relation which exempts one's benefactor from liability for negligence of his servants. The second ground is the relation subsisting between a hospital and the physicians who serve it. The relation is not one of master and servant. Here the wrong was not that of the hospital, but of a physician who was pursuing an independent calling.

"A hospital opens its doors without discrimination to all who seek its aid. It gathers in its wards, a company of skilled physicians and trained nurses, and places their services at the call of the afflicted... In this beneficent work, it does not subject itself to liability for damages though the ministers of healing whom it has selected have proved unfaithful to their trust."

This is still the law of the State in regard to the liability of a charitable hospital for acts of doctors and nurses. However, in Phillips v. Buffalo General Hospital, 239 N.Y. 188, the court, although it followed the Schloendorff case in determining whether a charitable hospital was liable for negligence of an orderly performing the duties of a nurse, criticized the doctrine of waiver as logically weak, stating that "it rests upon a patent fiction that the patient has voluntarily relinquished a known right by coming to the hospital for treatment." The court, also, raised the question whether a patient could be considered "charitable" if he paid a substantial sum.

In Hamburger v. Cornell University, 240 N.Y. 328, the court, in its holding as to the liability of the defendant for the alleged incompetence of an instructor, gave an avenue of approach to holding even a charitable hospital for the wrongful act of a doctor. "A hospital's immunity from liability for the errors of a surgeon and physician is .... ended with a duty to select with care. That duty fulfilled, there is no duty to supervise from day to day. The plaintiff must show that the duty of diligence was disregarded."

In Sheehan v. North Country Hospital, 273 N.Y.163, the plaintiff while riding in the defendant's ambulance was injured through the negligence of the driver. The defendant was a charitable hospital. The defendant pleaded immunity. The court held that the waiver doctrine was pretty much a fiction. It stated that to impose liability is to beget careful management. Public policy does not demand that an exception to the rule of respondeat superior be made in favor of a charity and against the person of a beneficiary.

These cases recite the law of New York as to the liability of a charitable hospital. The analysis shows us that such hospitals cannot be sued for negligence of physicians and nurses, except where the hospital was negligent in its selection of those persons.

When we examine the cases involving the liability of private hospitals, we find that they have always been held in cases where charitable hospitals would have been held.

Also, in Hendrickson v. Hodkin, 276 N.Y. 252, a private hospital was held for the injury to the plaintiff resulting from the application of a "quack" cure to the plaintiff while he was staying in the defendant's hospital. The superintendent admitted the plaintiff at the request of a third person, not a doctor, for treatment by this third person, of the patient. The court stated, "It is the duty of the owner of a sanitorium, conducted for profit to use reasonable care and diligence, not only in treating, but in safeguarding the patient." Here the basis of liability is not the negligence of the doctor or nurse in charge, but the wrongful conduct of the superintendent in affording for pay, the use of the hospital

for purposes of the commission of acts which constitute a tort or a crime."

We find that the Court of Appeals purposely did not decide the question as to liability of the private hospital for the negligence of a nurse in Kemp v. Crown Heights Hospital, 277 N.Y.602. The Appellate Division held that the defendant was not liable for the injury suffered by the plaintiff on two grounds. The first was that the relation of master and servant did not exist. The second ground was that the plaintiff had hired the nurse personally. The Court of Appeals affirmed on this latter ground expressly.

In Post v. Crown Heights Hospital, 173 Misc. 250, the court has taken what it considers the logical step in view of the Court of Appeals decision. It held that the interne was a special employee of the defendant, and that the defendant was liable on the theory of respondeat superior. "What he did was within the scope of his duties to the defendant, and was part of the services for which the plaintiff was paying the defendant.... It would seem that public interest would be more fully served if the rule of impunity, heretofore applied to hospitals, 'if public or charitable' was not extended to non-charitable hospitals."

The weight of authority fully supports the court on this holding as to the modification of this theory of immunity. Public policy now seems to require that a charitable or non-charitable hospital should be held for its own wrong. However, does that in any way affect the rules of law distinguishing between a servant and an independent contractor? In view of the cases cited and the principles of Agency, it is rather difficult to say that an interne, pursuing an independent calling, pursuing his own profession, is a servant. If an interne is a servant, what about a doctor or a nurse?

DUNTON FORT TYNAN

PEOPLE v. REED, 276 N.Y. 5

The defendant was indicted for violation of the gambling laws. Before any testimony was introduced, the defendant's counsel made a motion to dismiss the indictment on the ground that it did not state a crime. The trial judge did not rule upon the motion at this time, "as he was apparently in grave doubt regarding the law." However, the indictment was dismissed at the end of the whole case without submitting it to the jury. The People appealed to the Appellate Division from the order dismissing the indictment. The Appellate Division dismissed the appeal, and the case comes to the Court of Appeals on an appeal from this order. The Court of Appeals has decided that, albeit unfortunately, the right of appeal is purely statutory and in this particular instance there is no provision for appeal.

The objection that the indictment does not state a crime may be taken by demurrer, (Code Criminal Procedure §324 Subd.4); or it may be taken at the trial under the plea of not guilty and in arrest of judgment (Code Crim. Proc. §331). So, substantially, the defendant had three ways of raising the question at issue. He chose to raise it at the trial.

The question then arises whether this method, if successfully pursued, is appealable by the People. Appeals by the People are provided for by §518 of the Code of Criminal Procedure, which provides for appeals in the following cases:

1. Upon a judgment for defendant, on a demurrer to the indictment;
2. Upon an order of the court, arresting the judgment;
3. Upon an order of the court granting a motion made upon the minutes of the grand jury dismissing an indictment;
4. In all cases, where an appeal may be taken by the defendant, except where a verdict or judgment of not guilty has been rendered.

The court points out that had there been a demurrer or a motion for arrest of judgment there could be an appeal by the people. But, "If a judge dismisses an indictment on motion before a jury is called, there is no way to review his determination unless we stretch a point and say that such a motion amounts to a demurrer and is in writing when the clerk enters the motion in his minutes. Courts should not be forced to this artificial interpretation." (People v. Reed, 276 N.Y. 12).

The third subdivision does not apply at all, of course. The fourth subdivision, moreover, seems to have little, if any, meaning.

The case has been considered by the Judicial Council and is mentioned in its fifth annual report. They had this comment to make:

> "The motion to dismiss the indictment, however, although in effect the same as a demurrer or a motion in arrest of judgment in the case at bar, had to be placed in a separate

category, not because of any fundamental difference between them, but merely because the statute providing for appeals omits to mention them." (Judicial Council, Fifth Annual Report, p.40.)

There was introduced at the 1940 Session of the Legislature an act designed to remedy this gap in the criminal procedure. It is set forth here purely as a matter of information, since although it failed of passage, it will undoubtedly be again introduced in substantially the same form:

Section 1. Section 518 of the Code of Criminal Procedure is hereby amended to read as follows:

§518. Appeals by the people; when. An appeal to an appellate court may be taken by the people in the following cases:

1. (Upon)* From a judgment for the defendant, on a demurrer to the indictment;
2. (Upon) From an order of the court, arresting the judgment;
(3. Upon an order of the court granting a motion made upon the minutes of the grand jury, dismissing an indictment;)
3. From an order of the court, made at any stage of the action, setting aside or dismissing the indictment, or any count thereof, or otherwise terminating the action, on a ground other than the weight or sufficiency of the evidence adduced at the trial;
4. In all cases where an appeal may be taken by the defendant, except where a verdict or judgment of not guilty has been rendered.

§2. Section 519 of the code of criminal procedure is hereby amended to read as follows:

§519. Appeal to the court of appeals. An appeal may be taken from a judgment or order of the appellate division of the supreme court to the court of appeals in the following cases and no other;

1. From a judgment affirming or reversing a judgment of conviction;
2. From a judgment affirming or reversing a judgment for the defendant on a demurrer to the indictment (or from an order affirming, vacating or reversing an order of the court arresting judgment);
3. From an order affirming or reversing an order of the court setting aside or dismissing the indictment, or any count thereof, or otherwise terminating the action;
4. From an order affirming, vacating or reversing an order of the court arresting judgment;
(3) 5. From a final determination affecting a substantial right of the defendant.

§3. Section 543 of the code of criminal procedure is hereby amended to read as follows:

§543. May reverse, affirm or modify the judgment, order or sentence and order a new trial.

1. Upon hearing the appeal the appellate court may, in cases where an erroneous judgment has been entered upon a lawful

*Matter underlined is new; matter in parentheses is old law to be omitted.

verdict, or finding of fact, correct the judgment to conform to the verdict or finding; in all other cases they must either reverse or affirm the judgment or order appealed from or reduce the sentence imposed to a sentence not lighter than the minimum penalty provided by law for the offense of which the defendant or defendants have been convicted and in cases of reversal may, if necessary or proper, order a new trial.

2. Upon hearing an appeal from a judgment of conviction of a felony where, in its opinion, the record does not sustain the judgment with respect to the degree of the crime found but does warrant a judgment of conviction of a (lessor)* lesser* degree of such crime, or of misdemeanor, the appellate court may modify and correct the judgment in accordance with its opinion, in whole or in part, and affirm the judgment as so modified and corrected.

§4. This act shall take effect immediately.

"NOTE: This bill is recommended by the Judicial Council. It changes the statutory right to appeal as interpreted by People v. Reed, 376 N.Y. 5 (1937), and would permit the people to appeal from a dismissal of an indictment granted as a matter of law if the order were made during the trial just as is now permitted when such an order is granted upon a demurrer to the indictment or upon a motion in arrest of judgment, etc. It would not*allow an appeal from an order dismissing an indictment for reasons connected with the weight or sufficiency of the evidence. See Fifth Annual Report of the Judicial Council, p. 40, also Sixth Annual Report, p.55."

The question would be presented under this bill, if enacted into statute, whether in permitting the State to appeal from an order dismissing the indictment upon motion of the defendant after a jury has been impaneled, the objection of former jeopardy might be made available to the defendant in a retrial of the action. The point is mentioned by Chief Justice Crane although not raised, of course, in the Reed case. The Judicial Council is of the belief that the change would be constitutional and cites the case of Palko v. Connecticut, 302 U.S. 319. Whatever claim to fame or infamy this particular decision may be said to have would seem to arise chiefly from the number of law review articles it has provoked. That case involved an appeal by the State from a judgment of acquittal under a Connecticut statute allowing appeal by the People. The judgment was reversed by the Superior Court for error of law and upon a retrial the objection of former jeopardy was raised. The argument was made that the Fourteenth Amendment forbids to the states all that is forbidden to the Federal Government under the Bill of Rights. It was found, however, that the kind of double jeopardy to which the court had subjected this defendant was not such a violation of fundamental liberty as to come within the due process clause. The issue as to whether the facts constituted double jeopardy at all, however, is not decided.

*Parentheses and underlining INDICATED: Matter underlined is new; matter in parentheses is old law to be omitted.

It would seem, however, that the courts can approach the questionfrom several angles; either they may say that there is no jeopardy at all because it is not a new and independent case but a mere continuation of the same one under the same indictment; or, they may take the position that any new trial whether under the same indictment or under a new one constitutes jeopardy, assuming, of course, that the first trial proceeded to the drawing of a jury. (People ex rel. Stabile v. Warden, 202 N.Y. 138).

In the latter case, there could be a new trial only if the defendant had in some way waived the right to plead the former jeopardy. This seems to be the view taken in People v. Cignarala, 110 N.Y.23.

In any event, we may expect the law of the Reed case to be changed in the near future. The situation in which we are placed by this case finds justification only in the wording of the statute. It was obviously an oversight on the part of the Legislature and should be remedied.

BURNS FRANCIS BARLORD

TORT: INDUCING BREACH OF CONTRACT

It is necessary at the outset to circumscribe the limits within which this discussion will be confined. The necessity arises from the fact that there are many closely related topics - so close in some instances as to be barely distinguishable. Care must be exercised not to confuse the subjects of inducing a refusal to deal or continue a business relation - a secondary boycott - with that under discussion here. This article will be confined to that action which involves the intentional inducement of a breach of an existing contractual relationship.

Such action is comparatively new, particularly in New York State. It had its origin in the action created by the Ordinance of Labourers in England in 1350 and the subsequent Statute of Labourers. The action was given to the master of a servant, retained or employed by a third party, against the third party as well as against the servant. Of course, prior to these statutes there existed the Common Law action in favor of the master against a third party who had exercised violence upon the servant. During the subsequent centuries the statutory and Common Law actions became more and more confused until in 1853 the distinctions between them had disappeared.

In that year the first definite step toward the present state of the law upon this subject was taken by a decision of the Queen's Bench in the case of Lumley v. Gye, 2 El. & Bl. 216. In that case the plaintiff had contracted for the exclusive services of an opera singer for a fixed period and the defendant had succeeded in enticing her from the plaintiff's employ. A divided court refused to restrict a cause of action to a situation where the person enticed was a servant within the usual meaning of that word. For a long time thereafter considerable doubt existed as to the soundness of the decision and its fate the next time it appeared before the courts. Twenty-eight years later the problem was resolved when the English Court of Appeal in the case of Bowen v. Hall, 6 Q.B.D. 333, accepted the doctrine though by a divided court. Finally in 1893 the final step to the present doctrine was taken. In the case of Temperton v. Russell, 1 Q.B. 715, the court permitted an action to be maintained by the plaintiff, a purveyor of building materials against the defendants, union officers, who in order to bring pressure to bear on plaintiff, induced various builders to cease the performance of purchasing contracts. Perhaps, today, such an action would have been based upon an illegal or secondary boycott, but at the time of this decision the doctrine of boycott was quite undeveloped and the majority of the court based its decision upon the theory of illegal interference with the plaintiff's contractual rights. The doctrine was created; a new cause of action had appeared. For many years the New York courts impliedly rejected the doctrine. Finally in 1918 in the case of Posner Co. v. Jackson, 223 N.Y. 325, the Court of Appeals held that a complaint alleging "a knowing and intentional interference with the express contract rights of an employer with his employee" and further alleging such interference was intended to and did cause injury to the employer, stated a cause of action. The first cases in this jurisdiction involved employment contracts. However, in all the cases no attempt was made to confine the cause of action to this type of con-

tract. On the contrary the dicta plainly indicated that the remedy would be applied to any type of contract.

"The rule is that if one maliciously interferes with a contract between two parties, and induces one of them to break that contract, to the injury of the other, the party injured can maintain an action against the wrongdoer", (Lamb v. Cheney & Son, 227 N.Y. 418). In all the cases and textbooks involving or treating this cause of action the words "malice" or "maliciously" are invariably used as an element of such a cause. It is of the utmost importance, then, to determine what precisely is meant by these words, for the element of the cause of action which they are used to describe is essential and in many cases distinguishes it from some of the non-actionable cases of injury. It is important in attempting to determine the meaning of these words as used in this connection to consider the word which they are used to describe - interference or inducement. It is not sufficient merely to cause a breach of contract; a breach may be caused with impunity. In order to be actionable as against a stranger to the contract he, the stranger, must have induced or procured the breach. At first glance there would appear to be no distinction between causing and procuring a breach. Perhaps the terminology is not sufficiently definitive but upon reflection it will appear that there are two distinct concepts which in order to effect substantial justice must be differentiated. An example will readily point out both the distinction and the difference. A contracts to sell a quantity of finished suits to B. C, who has been supplying suiting to A, but not under contract, sells his suiting to another manufacturer at a higher price, mindful of A's contract with B, and knowing, too, that A will be unable to obtain suiting from any other source. There can be no doubt that C with full knowledge caused A to breach his contract with B but no one would seriously contend that he had thereby incurred a tort liability. From this it becomes apparent that the "malice" element of this cause of action is not of the same nature as the malice element in the field of torts generally. Thus, an examination of the words avails nothing in an effort to arrive at their meaning.

The meaning must be sought in the fundamental nature of the cause of action. In these cases or rather by this cause of action the courts seek to protect expected advantages, which when arising from a contractual source, are truly property rights. As pointed out above, not every situation in which expected advantages are defeated by the acts of a stranger will give rise to such a cause of action. The cases and text-writers insist that malice in the sense of spite or ill-will is not the gist of such an action. Yet, such an element must of necessity be mental, and, it exists, therefore, where the breach is directly and consciously sought as an end, in and of itself, or as an intermediate step from which the actor will gain some ultimate aim - as trade advantage. It is distinguishable from a situation where the breach occurs only as an incidental and undesired, though clearly foreseen and inevitable, result, the actor seeking an object unconnected with the purpose for which the original contract was made. The necessary mental intent of the actor has been compared withthe "animus furandi" of the thief. If not carried too far, if limited solely to the element of intent the analogy is acceptable, for the purpose of the cause of action is to grant legal redress for the theft of promised and expected profits.

The failure of the courts to point out precisely the elements of the cause of action, to set a definite standard by which liability could be tested, is due undoubtedly to the fact that the action is still too crude and formless. It has been said that "the judges generally have left unexplained the results reached by instinct."

Somewhat illustrative of the confusion and misunderstanding surrounding this type of action is the case of Reiner v. North American Newspaper Alliance decided by the Court of Appeals in 1932. The cause reached the court on a question of pleading, i.e., was the defense interposed sufficient at law. The Graf Zeppelin had granted exclusive new rights of its Trans-Atlantic flight to a third party. Plaintiff contracted with the defendant to send to defendant by means of a pre-arranged code radio messages descriptive of the flight, to be used by the defendant for publication purposes in the United States. Plaintiff having performed, sought to recover in this action the contract price. As a defense, it was alleged that the plaintiff knew of the contract granting the exclusive news privilege to a third party and that he had further agreed by the terms of his contract of passage with the Graf that he would give no interviews and send no reports descriptive of the flight. Six judges sat on the case; four opinions are reported, three concurring in result with the majority opinion which held the contract between the plaintiff and defendant constituted a tort - inducing the breach of a contract - and was therefore unenforceable, assuming the truth of the allegations of the defense. The three concurring opinions agreed that the contract was unenforceable. Judge Pound contended it constituted a tort, not, however, the same tort set out in the majority opinion, but rather upon the ground that it worked a fraud on a third party - the Graf Zeppelin and its promisee. Judge Crane contending the contract was unenforceable because "it is opposed to good morals and sound public policy" expressly denied the application of the "inducement doctrine." Judge Lehman bases his conclusion on sound public policy. If the majority opinion is correct a further extension of the doctrine has been made.

Would the third party who had contracted for the exclusive news rights have had a cause of action against the plaintiff for inducing a breach of contract? It would not seem so. True, plaintiff had breached his contract with the Graf Zeppelin and had thereby damaged the third party's contractual rights, still he did not induce the Graf Zeppelin to breach its contract nor was there as a matter of fact a breach of that contract. Whatever liability plaintiff incurred in favor of the third party, recovery would not lie in this type of action.

In view of the illusory tests of liability in such cases caution must be used to separate the actionable and the non-actionable interferences. This cause of action places a limitation upon the freedom of contract. But it will not be extended to stifle competition nor to attempt a control of business methods. Speaking of such a situation the Court of Appeals said, "Whatever we may personally think of these selfish, fierce and unfriendly contests for gain and for profit, the law is indifferent. Not until false, fraudulent and malicious methods are used to kill off a competitor does the law take notice." (Union Car Co. v. Collier,

263 N. Y. 386. But mere trade competition in and of itself will not constitute a defense. To date in New York it is necessary that a present contractual relationship exist before interference will give rise to a cause of action. Other jurisdictions, viz. Michigan, Maryland, and Connecticut, "have mulcted in damages him who interferes deliberately with one who would have received a contract but for the illegal interference."

In concluding a discussion of this topic it might be well to touch lightly the measure of damages available. Three different measures have been used from time to time. There is the breach of contract measure. By the use of this rule plaintiff may recover the same amount of damages as if the action had been brought against the party who actually breached the contract. It is well to remember that this action has no bearing on the action by the injured party against the person who actually breaches the contract except that a satisfaction of judgment in either of these actions precludes a recovery in the other. Then, there is that measure of damages which is used in tort cases involving the intentional invasion of property rights and finally, the rule that is used in the cases involving a negligent invasion of property rights. It seems that the proper measure to be applied in such cases is the one first mentioned. By a recovery apportioned in this manner the plaintiff is made whole, and that in the final analysis is the purpose of our civil legal system.

EUGENE PETER DEVINE

N O T E S

PURSUE THE RIGHT REMEDY.- Section 665 of the Civil Practice Act exempts certain special personal property from levy and sale under an execution. Subdivision 7 of this section provides "In addition the exemptions allowed by the preceding subdivisions of this section, necessary household furniture.....not exceeding in value two hundred and fifty dollars.....are (is) exempt from levy and sale by virtue of an execution, when owned by a person, being a householder, or having a family for which he provides, except where the execution is issued upon a judgment recovered wholly upon one or more demands; either for work performed in the family as a domestic or for the purchase money of one or more articles, exempt as prescribed in this section."

Matter of Brooklyn Loan Corp. v. Gross, 259 A. D. 165, presents an interesting application of this section. One John Belfiore, a widower, borrowed $200 from the petitioner, a personal loan corporation operating under the Banking Law. The loan was evidenced by Belfiore's promissory note. He also executed and delivered to petitioner a chattel mortgage covering his household furniture. Upon default in payment of the loan, petitioner obtained judgment against Belfiore in the Municipal Court of the City of New York for $142.21. Subsequently petitioner delivered to the respondent, a city marshal, an execution against Belfiore's personal property, tendered the marshal's fee and requested him to collect the amount due out of Belfiore's household furniture. The marshal refused to levy, claiming the furniture was exempt under the statute (C.P.A. §665 Subd.7). Petitioner thereupon moved in supreme Court for an order directing the marshal to levy upon and sell the household furniture under the execution. The parties assumed that Belfiore was a householder, entitled to the benefit of the exemption to the amount specified in the statute.

The court say (per curiam): "In the absence of a statute permitting him to do so, a householder may not consent to waive the exemption because such exemption rests upon public policy, and the law was designed to protect him against his own improvidence in giving such consent." The court then added: "That the owner may mortgage property which is exempt from levy and sale upon execution cannot be doubted. But 'If the creditor, instead of foreclosing, obtains judgment upon the mortgage debt, and levies upon the property mortgaged' as was one in this case, 'the debtor may claim his exemption.'" (Citing 1 Jones, Chattel Mortgages and Conditional Sales (6th ed.) §114).

The court holds that the statute relied upon by the petitioner (§356 Banking Law) does not "authorize the levy upon and sale by virtue of an execution upon a money judgment of exempt property which has been mortgaged by the householder to secure the debt, nor does it expressly or impliedly permit the borrower to waive the exemption."

The moral - pursue the right remedy!

R. B. B.

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VOLENTI NON FIT INJURIA.- An interesting case was reported last year in the Law Reports of the King's Bench Division of the High Court of Justice in England. -Interesting in that the Justice, Sir Cyril Asquith discusses succinctly the effect upon the law of negligence of the maxim "volenti non fit injuria." The case is Dann v. Hamilton, 1 (1939) K.B. 509. The King's Bench Division has jurisdiction of so-called "Common Law Cases." The other Divisions of the High Court of Justice are, The Chancery, The Probate, The Divorce, and The Admiralty. In effect the King's Bench tries most of the cases not tried by the other Divisions. (Organization and Ethics of Bench and Bar, Hicks, at p.11-26).

The plaintiff in the case, a Mrs. Dann, claims damages for personal injuries suffered by her in an automobile accident, caused by the negligent driving of the car in which she was a passenger, by one Mr. Hamilton. Hamilton had driven the plaintiff and her mother to London to see the Coronation decorations. They stopped to pick up a friend, Taunton, and all of them had several drinks. From the evidence Hamilton was slightly intoxicated, and drove rapidly and recklessly in taking the parties home. Taunton testified that the women became frightened and asked him to drive. Hamilton, in a recalcitrant mood, refused to let him, but did, however, promise to drive more carefully. The accident happened a few minutes after Taunton was let out at his home. Hamilton was killed and the actual defendant was Hamilton's widow representing his estate. The defendant raised the defense of assumption of risk, alleging that at the time the plaintiff entered the car the second time she knew the defendant was under the influence of drink to such an extent as to be incapable of having control of the car. Negligence was at the outset denied but during the trial the denial was withdrawn which left outstanding whether the claim was defeated by the maxim "volenti non fit injuria."

The court found that the plaintiff had knowledge that the defendant was under the influence of drink but allowed her to recover. Sir Justice Asquith, in a very terse manner, pointed out that there was very little case law in respect to the application of the maxim where the liability alleged is one of pure tort and not one involving the contractual liability of master and servant. He stated that there is no doubt that the maxim is applicable in cases where a person has been injured in a sport but there is a question as to whether it applies to negligence at all. "Where a dangerous physical condition has been brought about by the negligence of the defendant, and after it has arisen the plaintiff fully appreciating its dangerous character, elects to assume the risk thereof, the maxim has often been held to apply, and to protect the defendant. Where, however, the act of the plaintiff relied on as consent precedes and is claimed to license in advance a possible subsequent act of the defendant, the defendant cannot excuse his negligence by the application of the maxim." P.A. Landon in the latest edition of Pollock's Law of Torts illustrates this point by calling the reader's attention to the fact that the word as used in the maxim is "volenti" - not "scienti"; and also by pointing out that the whole law of negligence assumes the maxim not to be applicable.

In a case similar to the English case the courts of this State would hold that the maxim is inapplicable. It is to be noted, however, that the degree of intoxication as affecting the liability of the driver would be a question of fact for the jury, and further that the courts of this State generally hold that riding with an intoxicated person constitutes contributory negligence so as to preclude a recovery against a third party. (Meenegahn v. Buckmatter, 26 A.D.451, Clyclopedia of Automobile Law, 9th ed., Huddy, Vol. 5-6, p.262).

J. A. S.

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MORE ANENT A LAWYER'S PRIVILEGE.- In the April, 1940, issue of this Journal we took occasion to review Matter of Ellis, 258 App. Div. 558, (9 Albany Law Review 84), wherein the proposition was advanced that an attorney, summoned by the court to assist in an investigation of its officers as regards a charge that "ambulance chasing" was prevalent among members of the bar in Richmond County, was guilty of conduct prejudicial to the due administration of justice when he refused to answer questions on the ground that his answers would tend to incriminate or degrade him and at the same time refused to sign a waiver of immunity. A suspension of six months was visited upon Ellis for this alleged breach of duty to the court. One Grae was likewise summoned, took the stand, and met the same fate. Actually both were found to have asserted their privilege in bad faith, but the court held that the matter was immaterial and that a good faith invocation of the right would likewise have been a defiance of the court. Our previous discussion of the case was an attempt to prove that the learned tribunal was in error in adopting this viewpoint.

Since that time both men have carried the adverse ruling to the Court of Appeals and there have found justification for their contention that their constitutional privilege was not lost to them because of their status as attorneys. By a unanimous verdict, the ruling of the lower court in both cases was reversed and the charge of unethical conduct leveled at Ellis and Grae were dismissed. (Matter of Ellis, 282 N.Y. 435; Matter of Grae, 282 N.Y.428), the court finding neither party guilty of bad faith in his assertion of the privilege. Grae, at the time of the investigation, had been willing to answer all questions, simply refusing to sign a waiver of immunity. Ellis first refused to speak at all but later indicated a willingness to talk but not to sign the waiver. His testimony without the waiver was not taken. On these facts, said the highest court, bad faith could not be predicated and said that the lawyers were free from blame.

The argument of the case is brief. It rejects the suggestion of the Appellate Division that because the inquiry was not a criminal proceeding, the privilege should not prevail and makes reference to Matter of Rouss, 221 N.Y. 81 at p.86, in support of the principle that where the inquisition in a proceeding such as this one may expose the witness to punishment for crime, he may invoke

the privilege as protection. At page 434 in the Grae case, we read: "The privilege against self-incrimination is a constitutional guaranty of a fundamental personal right. Long regarded as a safeguard of civil liberty it was firmly embedded in the law of England and by the Fifth Amendment to the Federal Constitution became a basic principle of American constitutional law. 'It is a barrier interposed between the individual and the power of the Government, a barrier interposed by the sovereign people of the State: and neither legislators nor judges are free to overleap it.' (Matter of Doyle, 257 N.Y. 244, 250). Applying this basic principle to our present problem we have no doubt that when the appellant, as a witness upon the inquiry at the Special Term, declined to sign a waiver of immunity and thus refused to relinquish in advance a privilege which the Constitution guarantees to him, he was within his legal right."

J. J. McC.

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REVOCATION OF WILLS- The importance of §34 of the Decedent Estate Law, which governs the revocation and cancellation of written wills, may readily be judged by the great number of cases in which the court has been called upon to interpret it. Decedents have unconsciously exercised great ingenuity in devising different situations for the application of the statute. Sometimes very earnest attempts at revocation have been held ineffectual because of failure to comply with the statutory requirements. This furnishes an argument for employing professional advice, based on the assumption that the lawyer will be more familiar than the layman with the statute.

An interesting illustration of the application of the statute to a somewhat different factual situation is In re Kutzner's Will, recently decided by the Surrogate of Queens County and reported in 19 N.Y.Supp.2d 13. There the decedent's will, taken from his safe deposit vault, had evidently, when originally executed, satisfied the requirements of law controlling admission to probate. However, the paper revealed that diagonal and intersecting lines were drawn in ink through the printed and typewritten clauses embracing the disposition of property and the appointment of what decedent termed his "executive." Immediately below, and in what was a blank space at the time of the execution, testator had written the following:

> "To than this may be this will is no good I haven't been there when it was made out Fred Allen has one in his position Please have it void make this will no good sighn THEODOR KUTZNER."

Lines were drawn through the clause at the bottom of the page for the appointment of an executor. Whirls and loops were made in ink through the testamonium and attestation clauses. Several lines were drawn through the signatures of the three subscribing witnesses At the bottom of the fourth page the letters "N.G." were written in ink.

However quaintly his intention was expressed, the decedent succeeded in revoking the will, The court held that the will had

been cancelled and obliterated. The "cancellation" was effected by the use of the cross-lines on the writing as the court construed the meaning of the term with the aid of its Latin source "cancelli" meaning crossbars or latticework. However, the court said, "While the lines here drawn conform approximately to the original definition of the word, neither their number, form, nor direction are controlling..... If the markings do not affect the will in its entirety, or a vital part thereof, there is no revocation by cancellation. (Mat. Tremain, 257 A.D.996, affirming 169 Misc. 549, 7 N.Y.Supp.2d 781)."

Words of revocation, if actually written across the written words of the instrument, effect a revocation by cancellation. (Mat. Parsons' Will, 119 Misc. 26, 195 N.Y.S upp. 742, affd 236 N.Y. 580).

In the Kutzner case it will be noted that the testator wrote in a blank space. The court stated: "The test appears to be, where words of revocation are used, their extent and location. Where the words were wholly written upon the margin, rather than upon the face of the instrument, the writing was not regarded as a cancellation. (Matter of Akers' Will, 74 A.D. 461, affd 173 N.Y.620)" The court noted that the crosslines were drawn through the signatures of the witnesses amounted to an obliteration.

Hence, apparently the words of revocation were in themselves insufficient to effect a revocation by cancellation or otherwise. Words of revocation are indeed effective as a revocation only indirectly because by crossing the writing on the instrument they effect a cancellation. However, the words are helpful as necessary and conclusive proof of the testator's intent that the will, and the whole will, should no longer be operative. The signature was not necessary to constitute the cancellation but aided the proof that the testator made the changes. "The finding of the will in the testator's safe deposit box with its markings and written words of revocation raised the presumption that the cancellation was done by him with the intention to revoke it ("animo revocandi.")

The fact of finding the will in a place to which the testator alone had access: viz., the safe deposit box, is an important element in cases of this nature, as it was in the Parsons case cited, supra. Since it eliminated any fraud by third parties, such as disappointed heirs, it leaves only the question of the intent of the testator, which of course must be exercised in accordance with the statute. In cases of cancellation and obliteration the question usually arises whether it was the testator's intent to destroy the will in its entirety or merely to alter it.

In a case like the Kutzner case where the entire will was crossed out, and also in cases where - like the Kutzner case again - a material part of the will is obliterated it is quite apparent that the testator intended complete revocation and not mere alteration. We repeat the caution that it must first be established, by facts such as finding in a safe deposit box, that the testator wrought the changes. If the possibility of alteration by a third person is left open, all changes subsequent to original execution will be ignored, and the will proved as of the original as nearly as possible.

We venture the conjecture that in the Kutzner case, even though the written lines had been left out, the court would have construed the will as revoked.

J. L. B.

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RE DOMESTIC RELATIONS LAW §73.-

> D.R.L.§73. "Negligence of Parents or other Custodian Not Imputed to Infant. In an action brought by an infant to recover damage for personal injuries the contributory negligence of the infant's parent or other custodian shall not be imputed to the infant."

Prior to 1933 the rule as to imputed negligence seemed to be that the negligence of an infant's custodian was imputed to an infant who was non sui juris when said infant was suing for damages for personal injury. In 1933 this rule was limited by the case of Kupchinsky v. Vacuum Oil Co., 263 N.Y.128. The plaintiff's intestate, a child not three years old, was riding with her mother's consent on the seat of a truck beside her brother, eleven, and their uncle, Lesser, twenty-one, who was a defendant. There was a collision between this truck and one driven by an employee of the defendant company. The child was killed and the brother injured; recovery was had against both defendants. The defendant company appeals from the judgment for the death of the girl, contending that the negligence of Lesser, her custodian, must be imputed to the infant, who was non sui juris. The court held that to make this rule applicable the infant must have done something which in the case of an adult would have constituted negligence.

Upon the recommendation of the Law Revision Commission in 1935, the Legislature made the limitation pointed out by the court, absolute, by enacting D.R.L. §73.

Due to the wording of the statute, the question arises as to whether D.R.L.§73 and the rule laid down therein would apply to an action for the wrongful death of an infant non sui juris by its personal representative as created by Decedent Estate Law §130.

An action for wrongful death can be maintained by the personal representative of the deceased if the deceased could have maintained an action for personal injuries had he lived. Any defenses to the action by the deceased, will be good defenses in the wrongful death action.

Let us imagine a situation in which an infant non sui juris while playing in the street, is struck by an automobile and subsequently dies as a result of the injuries inflicted. Under D.E.L. §120 a special representative can bring an action for the personal injuries sustained. This action involves the elements of conscious pain and suffering, medical expenses, etc. The personal representative of the deceased has a cause of action for wrongful death.

D.R.L.§73 specifically provides that imputed negligence is immaterial in the action for personal injuries. Does this also apply

to the action for wrongful death brought by the personal representative of the deceased but which action has no other relation to the deceased? If so, it seems that the personal representative -- usually the parent -- might possibly be profiting by his own negligence which resulted in the death of the infant.

Previous to this statute (D.R.L.§73) the Court of Appeals held in McKay v. Syracuse R. T. Co., 208 N.Y. 359 (1908) in accord with Lewin v. Lehigh Valley Co., 52 A. D. 69 (1900, Fourth Dept.) that under a "death statute" a negligent parent could recover for the death of a non-negligent infant even though the parent be the sole beneficiary. The court justified its holding on two grounds: (1) that the "death statute" predicated the right to bring the action on the right the deceased would have had to sue for personal injuries had he survived (and negligence of the parent could not be imputed to the non-negligent infant in the personal injuries action) and (2) that the doctrine of Riggs v. Palmer, 115 N.Y.506, denying a wrongdoer the benefits of his wrong only apply to wilful acts.

D.R.L.§73 says nothing which affects these holdings and therefore it seems to me that the statute will apply to wrongful death actions and imputed negligence will be immaterial whether the action is for personal injuries to the deceased and brought by a special representative or for wrongful death and brought by the personal representative. (See further Law Revision Commission Reports 1935 pp. 9, 47-90).

H. M. L.

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HAMILTON v. REINEMANN, ILLUSTRATED.- The monotony of solid pages of black type has been relieved in the reported decisions of the Wisconsin Supreme Court. In at least two recently reported decisions of negligence suits (Hamilton v. Reinemann, 290 N.W. 194, and Anderson v. Eggert, 291 N.W,365, the opinions of the court have been embellished by pictures of the damaged automobiles. In the first named case no special reason for the added attraction was apparent, but in the latter, the court did say that the peculiarity of the case was that a determination of where the collision took place in effect determines the question of liability, and in an opinion which went into the facts with meticulous particularity, the exhibits set forth with the opinion were referred to. No apparent end is achieved by the use of such pictures in this manner and whatever justification their use may have, seems limited to their aesthetic qualities.

W.M.A.

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